United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1348

To be argued by
IRVING ANOLIK

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P/S

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

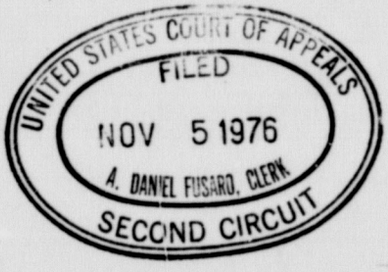
vs.

ROBERT BERKSON and
MAURICE RIND,

Defendants-Appellants.

On Appeal from the United States
District Court for the Southern
District of New York.

BRIEF OF DEFENDANT-APPELLANT RIND



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To be argued by
HYMAN ANOLIK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 76-1348
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UNITED STATES OF AMERICA,

Appellee,

v.

ROBERT BERKSON and
MAURICE RIND,

Defendants-Appellants.

----------x

BRIEF OF DEFENDANT-
APPELLANT MAURICE RIND

STATEMENT

Defendant-appellant MAURICE RIND appeals from a judgment of the United States District Court for the Southern District of New York rendered the 22nd day of July, 1976, after trial before Cannella, D.J., and a jury, convicting him of conspiracy to violate the Security Laws and of substantive counts thereunder. The Court sentenced the defendant to serve 18 months concurrently on 8 of the 10 counts of the indictment of which he was convicted, and a $10,000.00 fine. The defendant is presently at liberty pending this appeal.

Count One of the ten-count indictment was dismissed by the Court and the jury acquitted both defendants-appellants on Count Two. Count Ten was the conspiracy count. (638, 639)*

INTRODUCTORY

The defendant-appellant RIND hereby adopts the brief of the co-appellant Berkson and asks this Court deem the arguments set forth therein as though fully set forth in appellant RIND's brief. We see no purpose in duplicating the effort of co-appellant who is proceeding with retained counsel and RIND, who is proceeding with assigned counsel, at least to the extent as noted in the footnote supra.

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*Numerals in parentheses refer to pages of the official court reporter's minutes of trial, unless otherwise indicated. Defendant-appellant RIND, although having retained counsel herein, did not have any funds available to him and, consequently, both the Court below and this Court assigned counsel to handle the trial and the appeal respectively. The Court below directed that defendant-appellant RIND was to pay counsel the agreed fee when he acquired the monies which he expects to acquire, and was to reimburse the Government for any monies laid out in his behalf at that time as well. It should be noted that this case was tried twice, the first trial having ended in a hung jury.

SUMMARY OF THE EVIDENCE

The main witness, and indeed virtually the only witness against RIND, was James Gallentine, who was head of the "back office" of Packer-Wilbur Company, which is the stock brokerage for whom both RIND and Berkson worked during the period of time in question during the indictment.

Gallentine testified that he took orders from defendant RIND and defendant Wilbur Hyman. (31-34)*

The thrust of the testimony of Gallentine was that certain customers' stock was forged in order to consummate certain transfers of securities to keep Packer-Wilbur in business. This forgery took place without the consent of the customers and, presumably, without their knowledge or approval.

The witness, Gallentine, stated that Berkson apparently was unaware of this, although in a statement prior to commencing trial, he indicated to the Government that the contrary was the case.

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*It should be noted that defendant Wilbur Hyman, who was also indicted herein, has fled the United States and during the trial it was brought out that he is now in Spain and presumably beyond the reach of the United States Government. (72)

It is undisputed by the Government that Gallentine apparently changed his story to a significant extent from what it had been prior to trial, as told to the Government, and what he articulated at the trial itself.

Suffice it to say that during trial, Gallentine stated that although defendant RIND had never forged any securities and had never specifically told him or anyone else to forge such securities, that he was aware of it because he was told on several occasions that securities were needed for transfer and that only customers' securities were available. Gallentine asserted that RIND indicated that he was to do whatever was necessary to acquire the securities for transfer, and Gallentine declared that he therefore assumed that it was his, that is RIND's, instructions to forge securities. (41-44)

Gallentine also asserted that RIND himself had invested substantial time and had put in his own funds into Packer-Wilbur.

Gallentine further declared that much of the activity with respect to forgeries occurred prior to noon of the business day.

It is important to contrast this testimony with that of RIND's secretary at Packer-Wilbur, who testified at the trial, namely Linda Sussman. Miss Sussman declared that it was the uniform practice of her boss, MAURICE RIND, not to come to work until after noon. (2-5)

Gallentine testified that he and several other employees did actually forge the stock and that neither Berkson nor RIND actually committed any forgeries themselves.

Gallentine further declared that he knew what he was doing was illegal, but said that he was proceeding upon the instructions of both Hyman and RIND. (54-56)

There was testimony that certain stock of Ephraim Block, relating to Robotguard stock, actually belonged to Packer-Wilbur since there was an affidavit to that effect from Hyman. This was not specifically imparted to the jury but, of course, this did not relate to all the counts of the indictment and since concurrent sentences were imposed, we, of course, are asking this Court to consider the overall effect of the testimony of Gallentine as being unworthy of belief, rather than relying upon this one instance. (71)

Testimony was adduced from Gallentine that he was given employment by Berkson, or at least at Berkson's instance, after he left his position with Packer-Wilbur and after that firm finally collapsed. The Government adduced evidence that there were substantial transactions between both Gallentine and Berkson, which caused the Government to at least infer that Gallentine had altered his testimony because of the fact that Berkson had been such a great benefactor of his following the termination of his employment with Packer-Wilbur.

We are sure the Government will bring this out in more detail in discussing its evidence against Berkson. We have no desire to adduce any adverse testimony with respect to co-appellant Berkson, but merely mention it so as to allow the Court to become aware of the fact that the Government did take this position at the trial.

There was an effort to introduce certain statements of the missing defendant, Hyman, which had been given to Governmental agencies, but this was not allowed. We believe that co-appellant Berkson has

covered this aspect of error and, of course, as we have indicated previously, we are adopting the brief of co-appellant Berkson, since the issues primarily are very similar.

POINT I

THE GUILT OF THE DEFENDANT-APPELLANT RIND WAS NOT ESTABLISHED BEYOND A REASONABLE DOUBT.

We have indicated in our Statement of Facts that we are adopting the brief of the co-appellant Berkson.

We wish to point out, however, that virtually the only testimony adverse to defendant-appellant RIND was that of James Gallentine, who was an acoomplice as a matter of law. Moreover, the testimony of Gallentine apparently shifted from what he had indicated to the prosecutor and to the grand jury and what he actually adduced at the trial itself.

The only evidence of any criminality conceivably sufficient to warrant a conviction by the jury was uttered by James Gallentine. Strangely, he exonerated the co-appellant Berkson.

The main defendant herein was not on trial at all. That was Wilbur Hyman, who was President of Packer-Wilbur, and who apparently had fled to Spain and was now beyond the reach of the United States Government.

Although the testimony of Gallentine reveals that Gallentine and several employees, other than Berkson and RIND, had forged customers' securities and that those securities had moved in interstate commerce and through the mails, the remarks of Gallentine were that RIND necessarily knew about what was going on because of the fact that Gallentine from time to time had informed him that they were unable to transfer certain securities of Packer-Wilbur's because they lacked sufficient securities to do so. He declared that he further instructed RIND that customers' securities of these particular stocks were available and that the inference which was necessarily given was that unless these customers' securities were used and "forged", Packer-Wilbur could not transact certain deals which were important in trying to keep it afloat.

The witness, Gallentine, asserted that RIND implied, although never so stated in actual words, that

he should do whatever was necessary to accomplish the transaction and Gallentine therefore assumed that this meant that he had a right to use the customers' stocks and that this was in accordance with the expression of opinion of appellant RIND. Gallentine, of course, also laid blame upon the missing defendant, Wilbur Hyman.

We believe that the Court should have granted the motion made pursuant to Rule 29 of the Federal Rules of Criminal Procedure at the conclusion of the Government's case, and also at the conclusion of the entire case, that the matter not be submitted to a jury and that the indictment be dismissed because there was insufficient evidence to warrant submitting the matter to the jury altogether.

We think that this is a case which comes within the purview of UNITED STATES v. TAYLOR, (2 Cir. 1972), 464 F.2d 240 at 242, where this Court explained:

> "It is, of course, a fundamental of the jury trial guaranteed by the Constitution that the jury acts, not at large, but under the supervision of a judge. See Capital Traction Company v. Hof, 174 U.S. 1, 13-14, 19 S.Ct. 580, 43 L.Ed. 873 (1899). Before submitting the case to the jury, the judge must determine whether the proponent had adduced evidence sufficient to warrant a verdict in his favor.

Dean Wigmore considered, 9 Evidence §2494 at 299 (3d ed. 1940), the best statement to the test to be that of Mr. Justice Brett in Bridges v. Railway Co. [1874]. L.R. 7 H.L. 213, 233:

> [A]re there facts in evidence which if unanswered would justify men of ordinary reason and fairness in affirming the question which the Plaintiff is bound to maintain?

It would seem at first blush--and we think also at second--that more 'facts in evidence' are needed for the judge to allow men, and now women, 'of ordinary reason and fairness' to affirm the question the proponent 'is bound to maintain' when the proponent is required to establish this not merely by a preponderance of the evidence but, as all agree to be true in a criminal case, beyond a reasonable doubt. Indeed, the latter standard has recently been held to be constitutionally required in criminal cases. In re Winship, 397 U.S. 358, 361-364, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). We do not find a satisfying explanation in the Feinberg opinion why the judge should not place this higher burden on the prosecution in criminal proceedings before sending the case to the jury."

POINT II

THERE WAS NO EVIDENCE OF A SINGLE CONSPIRACY AS CHARGED IN THE INDICTMENT TO FORGE CUSTOMERS' SECURITIES. IT WAS OBVIOUS THAT GALLENTINE, APPARENTLY TAKING ORDERS FROM THE MISSING DEFENDANT HYMAN, CONSPIRED WITH OTHER EMPLOYEES (NOT RIND OR BERKSON), TO FORGE CUSTOMERS' SECURITIES.

We respectfully submit for this Court's attention the recent case of UNITED STATES v. BERTOLOTTI, et al, __F.2d__, decided November 10, 1975, 2 Cir. 1975, (Docket No. 75-1107 etc.) and KOTTEAKOS v. UNITED STATES, 328 U.S. 750, wherein it indicates that where multiple conspiracies, rather than a single conspiracy, are proved, that there must be a reversal.

In the case at bar, Gallentine admitted that there was never any direct instruction by RIND that he forge any customers' securities. He states that he did so because it was necessary to keep Packer-Wilbur afloat.

He further declared that he inferred that this was alright because of conversations he had with the appellant RIND and with the missing defendant Hyman. Gallentine admitted, however, that there was never any instruction given to him by RIND to commit any such forgeries.

In view of this fact, we submit that there was insufficient basis for concluding that any conspiracy existed involving RIND to forge any securities of Packer-Wilbur. If there was a conspiracy involving the Ephraim Block stock, that was separate and apart from any other conspiracy to forge customers' securities.

Additionally, it is submitted that Gallentine necessarily embarked upon this conspiracy with the direction of Wilbur Hyman, together with the lower employees whom he directed to commit the forgeries at his behest.

POINT III

THIS COURT SHOULD REMAND THE SENTENCING OF APPELLANT RIND FOR RESENTENCING BEFORE ANOTHER JUDGE IN VIEW OF THE DISPARITY BETWEEN HIS SENTENCE AND THAT OF BERKSON, ESPECIALLY IN VIEW OF THE PROSECUTOR'S STATEMENT AT TRIAL THAT THERE WAS NO DIFFERENCE BETWEEN THEM.

There has been a great deal of literature written on disparity of sentences on the same crime.

This Court, in its recent decision of October 22, 1976, in UNITED STATES v. SIDNEY STEIN, Docket No. 76-1299, had occasion to remand for a resentence before another Judge.

In the case at bar, the prosecutor indicated that there was really no difference between RIND and Berkson and could not understand why there should be any difference in treatment. We believe this involves a denial of equal protection of the laws and a violation of due process. (See UNITED STATES v. SELJO (2 Cir. 1976, 6/24/76); TOWNSEND v. BURKE, 334 U.S. 736 (1948); and, UNITED STATES v. ROBIN, (2 Cir. 10/15/76, Slip Op. 809, 815).

The Court below obviously either misunderstood the record or just arbitrarily decided to impose punishment of 18 months plus a $10,000 fine upon RIND,without any apparent justification for treating him differently than Berkson.

It is this type of arbitrariness that makes a mockery of the entire sentencing structure. How does one explain such disparities to a client after the prosecutor himself declares that there is no reason to treat them differently?

Accordingly, we ask that this matter be remanded for resentence, preferably before a different Judge.

POINT IV

WE ADOPT HEREIN, AS WE HAVE STATED PREVIOUSLY, THE ARGUMENTS OF CO-APPELLANT BERKSON.

We have incorporated by reference all of the arguments of the co-appellant so far as relevant to RIND.

CONCLUSION

The judgment of conviction should be reversed.

Respectfully submitted,

IRVING ANOLIK
Attorney for Defendant-
Appellant RIND
(By Assignment of this Court)

AFFIDAVIT OF SERVICE BY MAIL

Re: U.S.A. v. BERKSON and RIND
Docket No. 76-1348

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

BEATRICE L. STARK, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at Queens, New York.

On November 4, 1976, deponent served the within Brief of Defendant-Appellant RIND upon the United States Attorney, Southern District of New York, attorney for Appellee in this action, at One St. Andrew's Plaza, New York, N.Y. 10007, the address designated by said attorney for that purpose, by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Beatrice L. Stark
BEATRICE L. STARK

Sworn to before me this

4th day of November, 1976.

H. Harvey Simon

H. HARVEY SIMON
NOTARY PUBLIC, State of New York
No. 24-[illegible]
Qualified in Kings County
Commission Expires March 30, 1977